

U.S. FOREIGN
INTELLIGENCE
SURVEILLANCE COURT
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JEANN FLYNN HALL
CLERK OF COURT

UNITED STATES
FOREIGN INTELLIGENCE SURVEILLANCE COURT
WASHINGTON, D.C.

IN RE ORDERS OF THIS COURT
INTERPRETING SECTION 215
OF THE PATRIOT ACT

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Docket No.: Misc. 13-02

**SECOND SUBMISSION OF THE UNITED STATES
IN RESPONSE TO THE COURT'S NOVEMBER 20, 2013 ORDER**

In its September 13, 2013 Opinion and Order, the Court directed the United States to identify those opinions of this Court that evaluate the meaning, scope, and constitutionality of Section 215 of the USA PATRIOT Act, 50 U.S.C. § 1861, that are at issue in ongoing Freedom of Information Act ("FOIA") litigation in the U.S. District Court for the Southern District of New York. Opinion and Order at 1, 18. The Court also directed the United States to identify any such opinions that are not at issue in the FOIA litigation or already subject to the Court's publication process pursuant to Rule 62(a) of the Court's Rules of Procedure, and to propose a timetable to complete declassification review of any such opinions. *Id.* at 18.

On October 4, 2013, the Government filed a submission in response to the Court's September 13, 2013 Opinion and Order, and moved for a stay of further proceedings due to lapsed appropriations. The Government identified, *inter alia*, the Opinion issued in Docket Number BR 13-25 on February 19, 2013, as one that contains "analysis by this Court evaluating the meaning, scope, and/or constitutionality" of Section 215 of the USA PATRIOT Act, 50 U.S.C. § 1861, and that is not at issue in the FOIA litigation in the Southern District of New York. Submission at 2.

On October 8, 2013, the Court granted the Government's motion for a stay of further proceedings. The Court also directed the Government to submit to the Court, within seven days of the restoration of appropriations, a proposed timetable for completing the declassification review of the Opinion issued in Docket Number BR 13-25 on February 19, 2013, and submitting to the Court any proposed redactions for the Opinion. On October 24, 2013, the Government estimated that it would complete the declassification review of the Opinion and submit to the Court any proposed redactions by November 18, 2013.

On November 18, 2013, the Government filed a submission stating that "the Executive Branch ha[d] determined that the Opinion should be withheld in full and a public version of the Opinion cannot be provided." Second Submission of the United States in Response to the Court's October 8, 2013 Order at 2. On November 20, 2013, this Court ordered that, no later than December 20, 2013, the Government should submit a detailed explanation of its determination that a public version could not be provided. *Id.* at 2.

On December 20, 2013, the Government filed a submission stating that the Opinion could be withheld in full because the Opinion is not only classified but also pertains to an ongoing law enforcement investigation, and therefore is protected by the law enforcement investigatory privilege. However, the Government noted that, upon review and as a discretionary matter, the Government does not object if this Court determines, pursuant to Rule 62(a), that those portions of the Opinion that are not classified and the release of which would not jeopardize the ongoing investigation should be published. The Government identified for the Court, in a proposed redacted opinion and the Declaration of Richard McNally, Acting Deputy General Counsel, Federal Bureau of Investigation, those portions of the Opinion that are classified and/or the release of which would harm the ongoing investigation.

On January 23, 2014, at the Court's request, the Government met with Court staff regarding the Government's proposed redactions to the Opinion. In response to questions from the Court's staff, and upon further review of the Opinion, the Government has determined that certain additional information in the Opinion is not classified and the release of that additional information would not jeopardize the ongoing investigation. The Government has identified for this Court, in the attached revised copy of the Opinion, the portions of the Opinion that are classified and/or the release of which would harm the ongoing investigation.¹ All of the text that the Government has determined should not be released in the Opinion is contained in text boxes. Any publication of the Opinion by this Court should not include these portions. *See* FISC Rules of Procedure 3, 62. Should the Court elect to publish the Opinion, pursuant to Rule 62(a), the Government will provide the Court with a redacted version of the Opinion, appropriate for publication, blacking out the information currently contained in the text boxes and striking through any classification markings that are no longer valid.

¹ In addition, the Government has identified the name of one government employee that should be redacted if the Opinion is published.

February 6, 2014

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the Second Submission of the United States in Response to the Court's November 20, 2013 Order was served by the Government via Federal Express overnight delivery on this 6th day of February, 2014, addressed to:

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